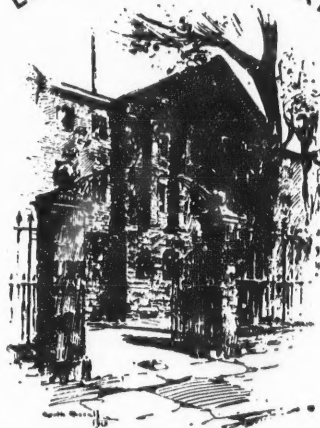


NOVA SCOTIA
LEGISLATIVE LIBRARY



PROVINCE HOUSE

IN THE
Supreme Court of Nova Scotia,
1881.

ON APPEAL
FROM THE
County Court, District No. 1.

JOHN A. WATSON, Plaintiff,

vs.

WILLIAM R. HENEY, LORENZO A. BARNABY, } Defendants,
and THOMAS J. PAYNE, } Appellants.

WILLIAM F. McCOY, Q. C.,
Attorney of Plaintiff.

OTTO S. WEEKS,
JOHN MENDER,
Attornies of Defendants.

HALIFAX, N. S.:
PRINTED BY THE NOVA SCOTIA PRINTING COMPANY,
1881.

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In the County Court, 1880.

HALIFAX, SS.

JOHN A. WATSON, *Plaintiff,*

vs.

WILLIAM R. HENEY, THOMAS J. PAYNE, and LORENZO A. BARNABY, *Defendants.*

The defendants herein appeals from my judgment given herein for the plaintiff, on the first day of December, A. D. 1880, and said appeal having been perfected to my satisfaction.

I certify to the Supreme Court the appeal papers following:—

The pleadings marked A. B. C., my minutes and judgments marked D., a copy of the execution put in evidence herein marked E., the rule for appeal F.A., a copy of the bond to the Sheriff marked F., a copy of the capias marked A., and also appearance marked H.

10

Given under my hand this 10th day of December, A. D. 1880.

Signed,

J. W. JOHNSTON.

“A.”

HALIFAX, SS.

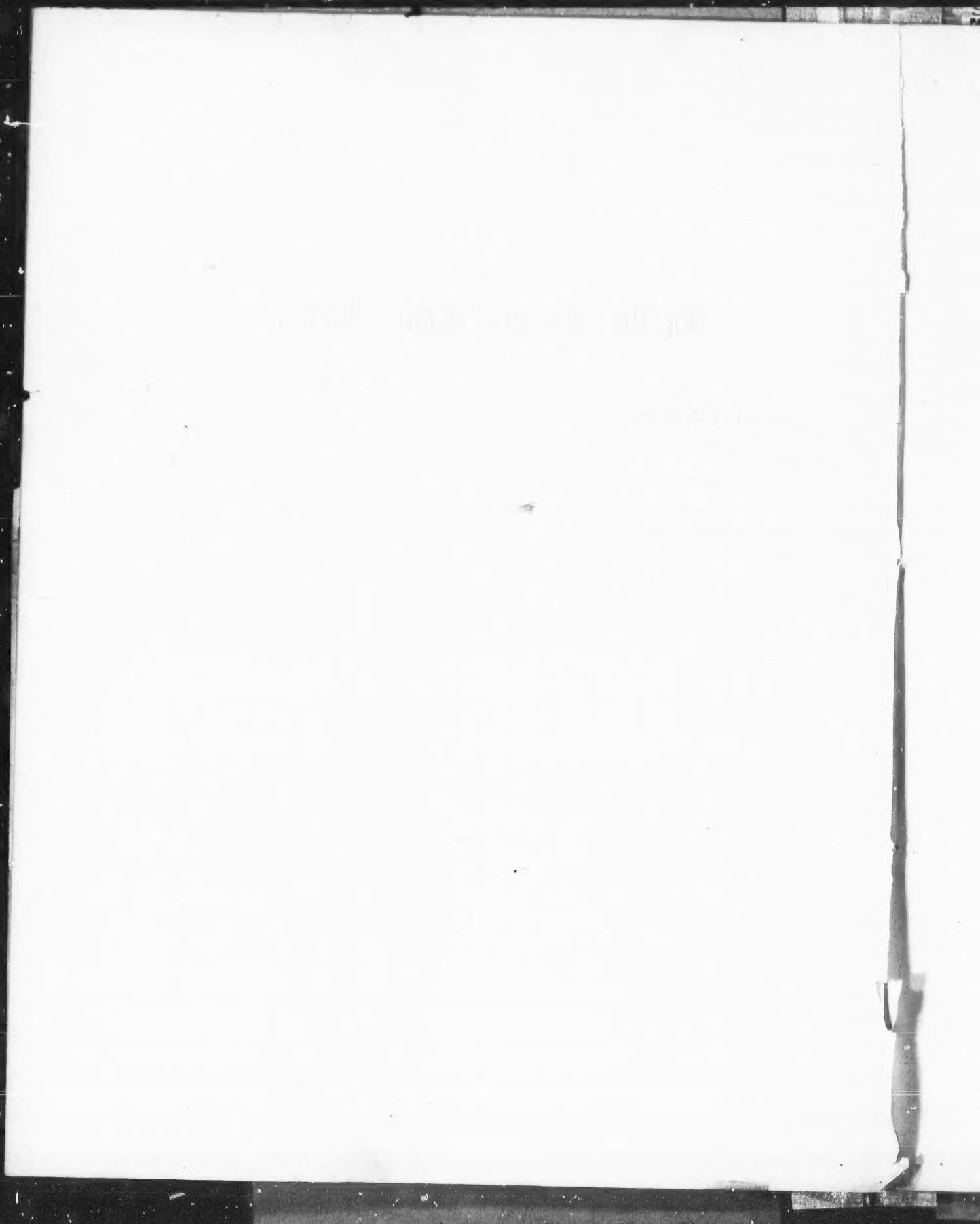
*Victoria by the Grace of God of the United Kingdom of Great Britain and Ireland,
Queen, Defender of the Faith, &c., &c.*

[LIB. STAMP.]

TO THE SHERIFF OF THE COUNTY OF HALIFAX, OR ANY OTHER OF OUR SHERIFF'S:

We command you to summon William R. Heney, now or lately of the City and County of Halifax, Gentleman, Thomas J. Payne, of the City and County of Halifax, Clerk, and Lorenzo A. Barnaby, of the same place, Clerk, the defendants herein, to appear in the County Court at Halifax, within ten days after the service of this writ, at the suit of John A. Watson, the plaintiff herein, who says that the defendants, by their bond, dated the 26th day of April, A. D. 1880, became bound to Joseph Bell, Esquire, as and being the Sheriff of the County of Halifax, in the sum of one hundred and seventy-seven dollars and fifty cents, to be paid to the said Sheriff or his assigns, subject to a certain condition thereunder written, whereby the

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condition of the said bond was declared to be such, that if the bounden William R. Heney did appear in the County Court at Halifax within ten days from the date of said bond, to answer to the suit of the plaintiff herein, and in case judgment should be obtained against the said William R. Heney, if he should satisfy such judgment or should render himself or be rendered by the said Thomas J. Payne and Lorenzo A. Barnaby, into the custody of the Sheriff of the County of Halifax, then the said obligation should be void. Yet the said William R. Heney did not appear in the County Court at Halifax, within ten days from the date of said bond, to answer to the suit of the plaintiff herein, and although the plaintiff afterwards, by the judgment of the said Court, recovered in the said action against the said William R. Heney, one hundred and seventy-six dollars and ninety-six cents for his debt and costs of suit in that behalf, yet the said William R. Heney has not paid or satisfied said judgment, nor has he rendered himself or been rendered by the said Thomas J. Payne and Lorenzo A. Barnaby, the defendants herein, into the custody of the Sheriff of the County of Halifax, whereby the said bond became forfeited, and thereupon the said Joseph Bell, as such Sheriff as aforesaid, endorsed the said bond to the plaintiff according to the statute in such case made and provided. And the plaintiff claims two hundred dollars.

Issued July 10th, A. D. 1880.

Signed,

M. I. WILKINS,
Clerk.

MACCOY & LONGLEY, Plaintiff's Attornies.

The following are the particulars of the plaintiff's claim:

To amount of debt and costs in suit Watson vs. Heney.....	3176 96	
To amount of penalty of bond.....	177 50	50

I served a copy of this writ on the within named defendant, Lorenzo A. Barnaby, on the 12th day of July, 1880. Fees, 90 cents.

JOSEPH BELL,
Sheriff.

IN THE COUNTY COURT,)
HALIFAX, SS., 1880. }

CAUSE.—JOHN A. WATSON, *Plaintiff*.

vs.

WILLIAM R. HENEY, THOMAS J. PAYNE, and LORENZO A. BARNABY, *Defendants*.

Take notice of trial in the above cause for the first day of the next ensuing sittings in October, of this honorable court, at the City of Halifax, or so soon after as the said court shall be at leisure to hear the same.

MACCOY & LONGLEY,
Attornies of Plaintiff.

To the Defendants or their Attorney.



IN THE COUNTY COURT.

WATSON } Summons
vs. } and
HENY. } Declaration.

Notice is hereby given that if the defendants do not appear and plead within four days 70
after the period specified in the writ for their appearance, the plaintiff shall be at liberty to
sign final judgment for any sum not exceeding the sum claimed in his particulars of demand
with interests and costs.

Yours,

MACCOY & LONGLEY,
Plaintiffs Attornies.

Received 16th July, 1880.

I accept service of this writ for Thos. J. Payne, one of the within named defendants.

Received July 10th, 1880.

JOHN MENDER.

"B."

IN THE COUNTY COURT, 1880.

HALIFAX, SS.

80

CAUSE.—JOHN A. WATSON, *Plaintiff*.

vs.

WILLIAM R. HENY, THOMAS J. PAYNE, and LORENZO A. BARNABY, *Defendants*.

1. William R. Heny and Lorenzo A. Barnaby, two of the above named defendants, by
Otto S. Weeks their Attorney, for a plea to the plaintiff's writ and declaration say, that the
alleged bond is not their bond, nor is the alleged bond the bond of either the said William R.
Heny or of the said Lorenzo A. Barnaby.

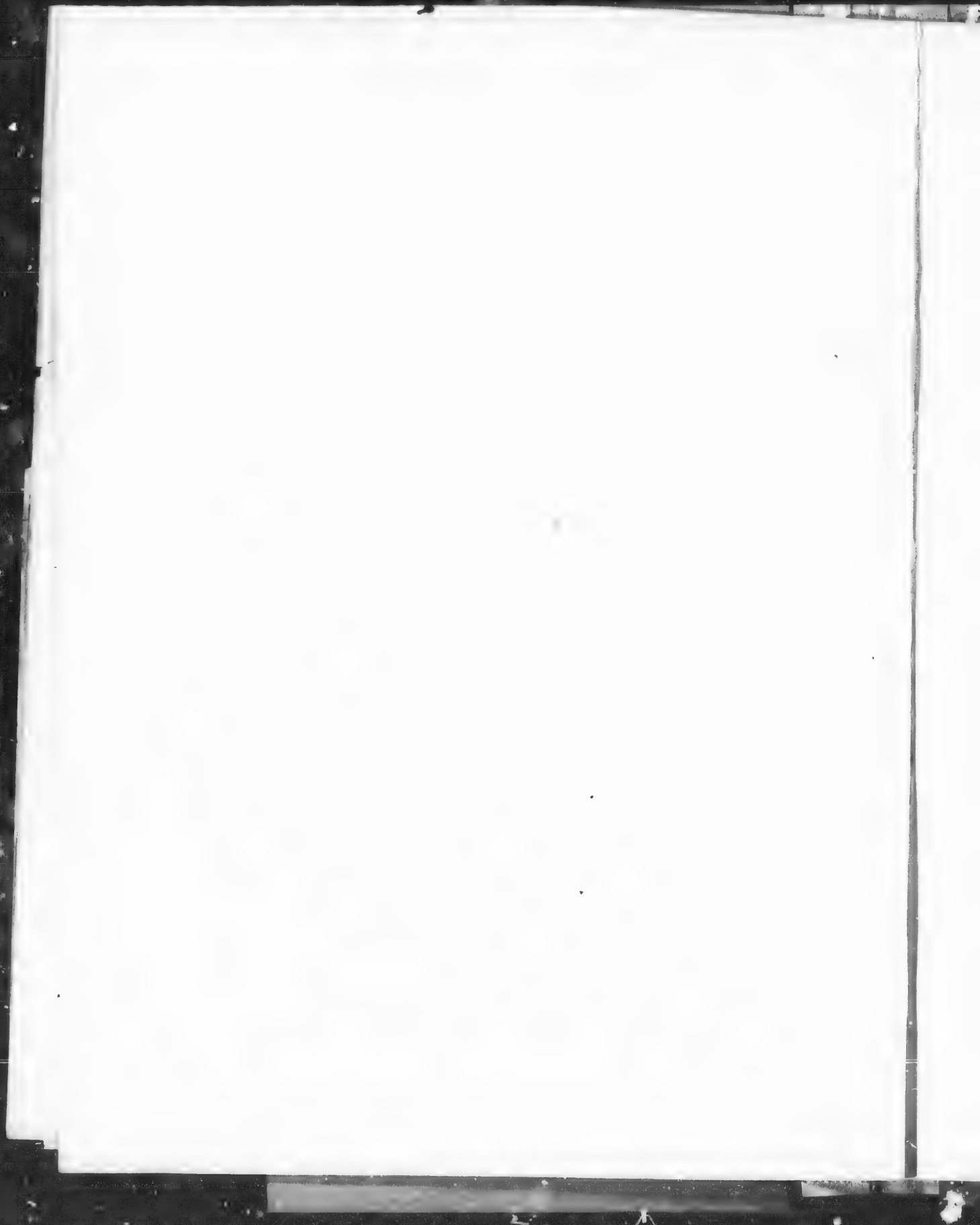
2. And for a second plea the said defendants William R. Heny and Lorenzo A. Barnaby
say, that the said Sheriff did not duly assign the said bond to the plaintiff according to the 90
form of the said statute as alleged.

3. And for a third plea the said defendants William R. Heny and Lorenzo A. Barnaby
say, that after the recovery of the judgment referred to in plaintiff's writ and declaration,
and before this suit no writ or declaration was sent out of the said court here, against the said
William R. Heny upon the said judgment, and returned into the said court.

4. And for a fourth plea the said defendants William R. Heny and Lorenzo A. Barnaby
say, that this action was brought before the time for rendering the said defendant Wm. R.
Heny, against whom the judgment was obtained, according to the course and practice of the
court in which the said judgment was obtained, had expired or elapsed.

5. And for a fifth plea the said defendants William R. Heny and Lorenzo A. Barnaby 100
say, that before this action was brought, the said defendant William R. Heny, paid and
satisfied the said judgment.

6. And for a plea upon equitable grounds, the said defendants William R. Heny and
Lorenzo A. Barnaby say, that the said plaintiff on the twenty-sixth day of June, A. D., 1880,



recovered judgment against the said defendant William R. Heney, and afterwards on the said twenty-sixth day of June, caused to be issued an execution against the said defendant William R. Heney, which execution was on the Fifth day of July, A. D., 1880, returned non est inventus, and in consequence of said return, said defendants William R. Heney and Lorenzo Barnaby had not sufficient time given to them by said plaintiff, wherein to render the said William R. Heney. 110

OTTO S. WEEKS,
Attorney of William R. Heney and Lorenzo A. Barnaby.

"C."

IN THE COUNTY COURT, 1880.

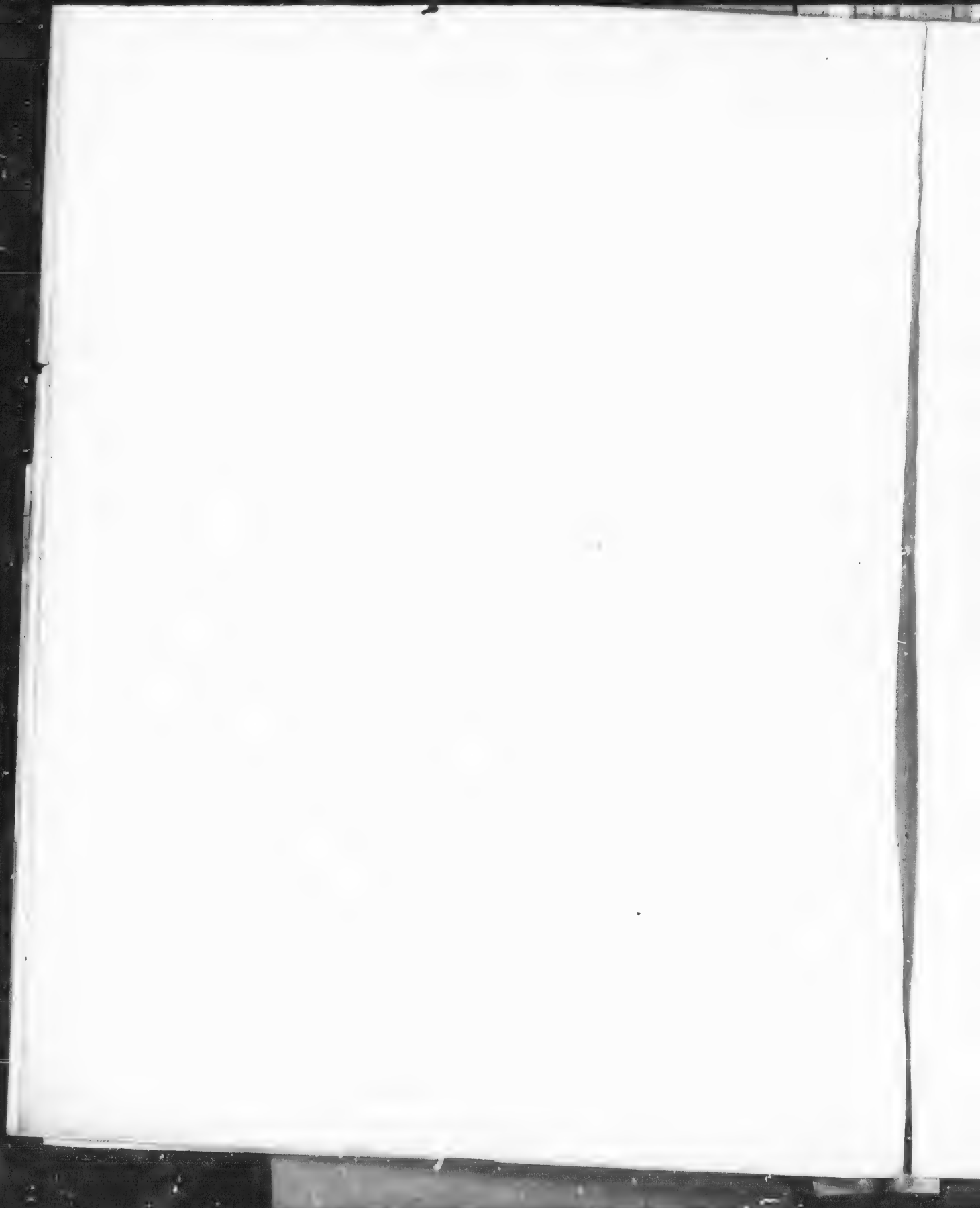
HALIFAX, SS.

JOHN A. WATSON, *Plaintiff.*

vs.

WILLIAM R. HENEY, THOMAS J. PAYNE and LORENZO A. BARNABY, *Defendants.*

1. Thomas J. Payne, one of the above named defendants, by John Menger his Attorney, for a plea to the plaintiff's writ and declaration herein, says, that the alleged bond is not his bond. 120
2. And for a second plea to said writ and declaration, said defendant Thomas J. Payne says, that the said Sheriff did not duly assign the said bond to the plaintiff according to the form of the said statute, as alleged.
3. And for a third plea to said writ and declaration, said defendant Thomas J. Payne says, that after the recovery of the said judgment, and before this suit, no writ or execution was sued out of said court against the said William R. Heney upon the said judgment, and returned into said court.
4. And for a fourth plea to said writ and declaration, said defendant Thomas J. Payne says, that this action was brought before the time for rendering the defendant William R. Heney, against whom the judgment referred to in said writ and declaration was obtained, according to the practice and course of the court in which said judgment was obtained, had expired or elapsed. 130
5. And for a fifth plea to said writ and declaration, said defendant Thomas J. Payne says, that before this action was brought, the said Thomas A. Payne paid and satisfied the said judgment.
6. And for a plea upon equitable grounds to the said writ and declaration, said defendant Thomas J. Payne says, that the said plaintiff on the twenty-sixth day of June, A. D., 1880, recovered judgment in this honorable court, against the said defendant William R. Heney, and on the twenty-sixth day of June, A. D., 1880, issued an execution upon said judgment, against the said William R. Heney, directed to the Sheriff of the County of Halifax, and said execution was returned non est inventus, by the said Sheriff, on the Fifth day of July, A. D., 1880, that 140



in consequence of such return, the said defendant Thomas J. Payne, had not sufficient time given to him by the said Plaintiff, wherein to render the said defendant William R. Heney.

JOHN MENDER,

Attorney of Thos. J. Payne, one of the above named defendants.

To the Plaintiff or his Attorney.

"D."

JUDGE'S MINUTES AT TRIAL.

150

WATSON v. HENEY.

Longley tendered bond dated 26th April, 1880, from Heney and others, to Sheriff Bell, received marked "A," J. W. J. Judgment Book 7. 219, *Watson vs. Heney, et al.*, \$176 96.

Mortimer—At Clerk Prothonotary's Office; Book No. 7; original judgments; signature of Judge to judgment; *Watson vs. Heney*. Record in cause tendered and received marked "B," J. W. J.

Execution tendered and received—Sheriff Bell.

Endorsement on back of bond my hand-writing, endorsed it to plaintiff under statute, and returned it to court.

Execution "B." placed in my hands 26th June, 1880. I returned it. Endorsement on back. Heney did not render himself, nor was he rendered by his bondsman. I made enquiries but could not find Heney. 160

Cross-Examined.—Execution issued 26th of June, date of return, 5th July, 60 days had not expired.

Plaintiff rests.

Frith for nonsuit.

1. Summons could not have issued until after the expiring of 60 days from issue of execution.

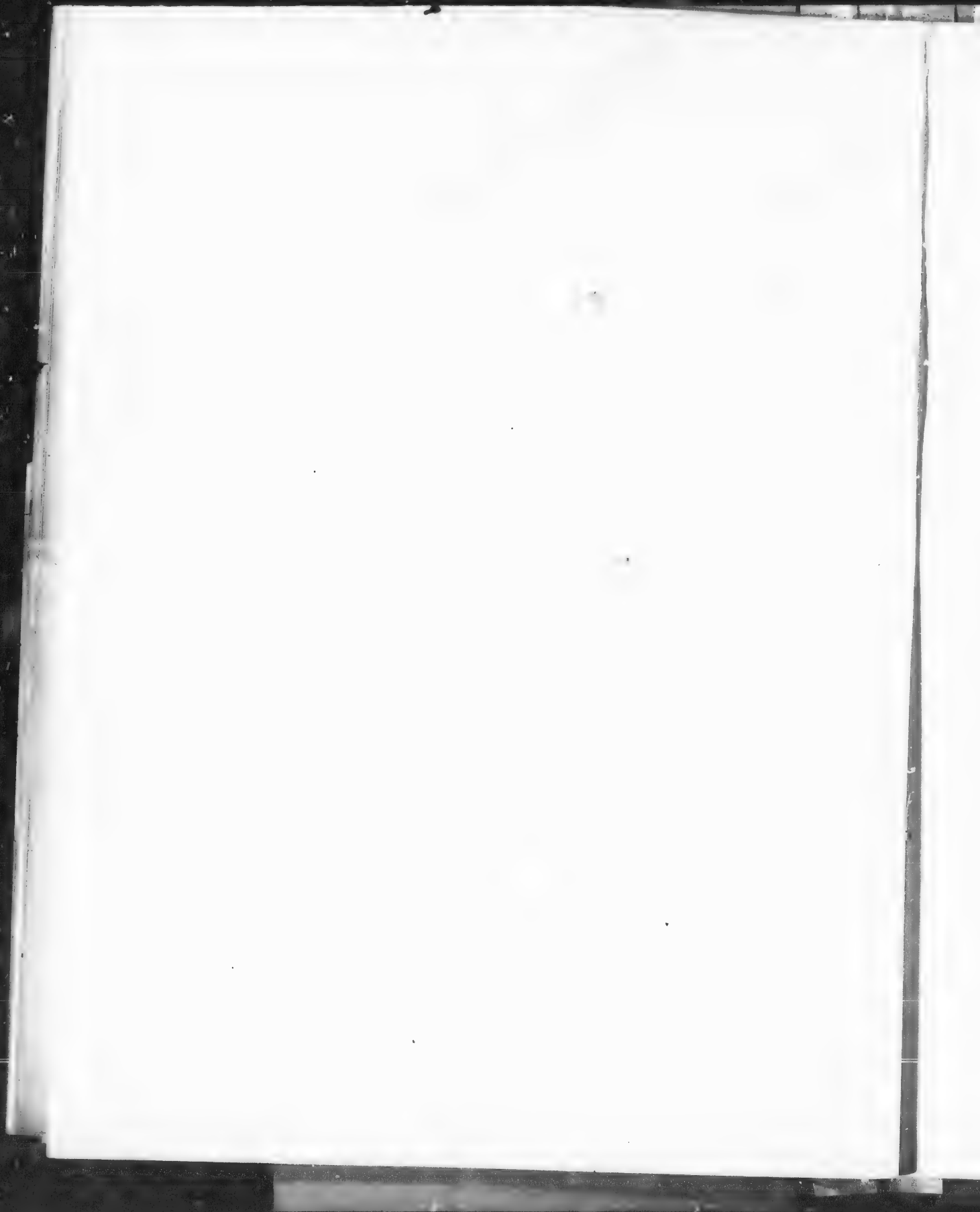
2. Fact of issue of execution should have been alleged in the summons. Execution must have issued before summons. 2 Tidd, sec. 1098, p. 1097-1098, *Sandoff vs. Proctor*, 7 B. & C., 800, 2 C. B. 367, execution must be returned, certain, and lay in office four last days. 2 Field, p. 1098. 2 Sul., 599. 13 East, 588. *Witter vs. Mountcalm*, 10 Wood, 267. *Roscoe*, 504. Practice Act, 264. 170

MacCoy.—Chit., Arch., 885. *Capias*, 2 Russell.

JUDGE'S JUDGMENT.

WATSON v. HENEY.

This was an action on a Bail Bond, given to the Sheriff and Assigned, and the sole question at issue is one of practice, had the execution been issued a sufficient time prior to the bringing of the action.



The execution was issued and handed to the Sheriff 26th June, 1880, and returned by him the 5th July. 180

By our Practice Act an execution is to be made returnable either in sixty days or the first day of the next succeeding term, but in no case to be made returnable in less than sixty days, and to fix the Bail must have lain in the Sheriff's office the last four days. The practice in this case had not been followed; the execution was irregular, as was bringing the action on it against the Bail.

The question here arises, how is the irregularity to be taken advantage of. This point, though not mooted at the trial, I have looked into with some care. Chitty on Pleadings lays it down that matter founded solely on the rules or practice even of a court of law, or being mere irregularities, is not in general pleadable; and I gather from the numerous cases I have looked into that matters that go to the very merits of the case are pleadable, but that matters of practice are only the subject of motions to set aside pleadings for irregularities. See 1, D. & R., 50; 5, Moore 172, &c., and 2 Kidd, 1128. 190

If writ be merely irregular, as if it has not lain four days in Sheriff's office, or been made returnable a day out of term, Bail cannot take advantage of the irregularity by pleading. Bail may plead that no *capias ad satisfaciendum* was sued out and returned against the principal; or that the *veniri* was laid in a wrong county may be pleadable as going to the merits; but mere irregularities such as suing out *casu* after a year without a *sciri facias* to revive judgment; or if made returnable a day out of term, or had not lain four days in Sheriff's office, cannot be taken advantage of by pleading, though it may be made the subject of motion. Peters on Bail, 366. 200

The matter here is merely an irregularity as contrary to the practice of the Court, and does not touch the merits, and cannot therefore be pleaded, and the plaintiff is consequently entitled to recover.

Judgment for plaintiff for penalty of Bond, \$177.58.

"E."

HALIFAX, SS.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland,
[L. S.] *Queen, Defender of the Faith, &c.*

TO THE SHERIFF OF OUR COUNTY OF HALIFAX, OR TO ANY OTHER OF OUR SHERIFFS: 210

Whereas, John A. Watson, by consideration of our Justice of our County Court, at the City of Halifax, on the 23rd day of June last, recovered judgment against William R. Heney, of Halifax, for the sum of one hundred and twenty-seven dollars and fifty-nine cents, debt or damage, and the sum of forty-nine dollars and thirty-seven cents, costs of suits, as appears to us of record, whereof execution remains to be done. We command you therefore, that of the goods, chattels, lands, or tenements of the said William R. Heney, within your precinct you



cause to be paid and satisfied unto the said John A. Watson, at the value thereof in money, the aforesaid sums being one hundred and seventy-six dollars and ninety six cents, and thereof also to satisfy yourself for your own fees; and for want of goods, chattels, lands, or tenements of the said William R. Heney, to be by him shown unto you, or found within your precinct, to the acceptance of the said John A. Watson, to satisfy the sums aforesaid: We command you to take the body of the said William R. Heney, and commit unto our gaol in Halifax, and detain in your custody within our said goal until he pay the full sums above mentioned, with your fees, or that he be discharged by the said John A. Watson, the creditor or otherwise, according to law. Whereof fail not, and make due return of this writ unto our said County Court at Halifax, in sixty days from the date hereof. 220

Issued this twenty-sixth day of June, A. D., 1880.

J. W. LONGLEY,
Plaintiff's Attorney.

Signed,

M. I. WILKINS,
Clerk.

230

MR. SHERIFF,

Take the body of the within named defendant, under the within execution,

Yours truly,

J. W. LONGLEY,
Plaintiff's Attorney.

I cannot find the within named defendant within my baliwick.

Fees, 30 cents.

Signed,

JOSEPH BELL,
Sheriff.

Halifax, 5th July, 1880. Received 26th June, 1880.

“F.A.”

COUNTY COURT, }
HALIFAX, SS. }

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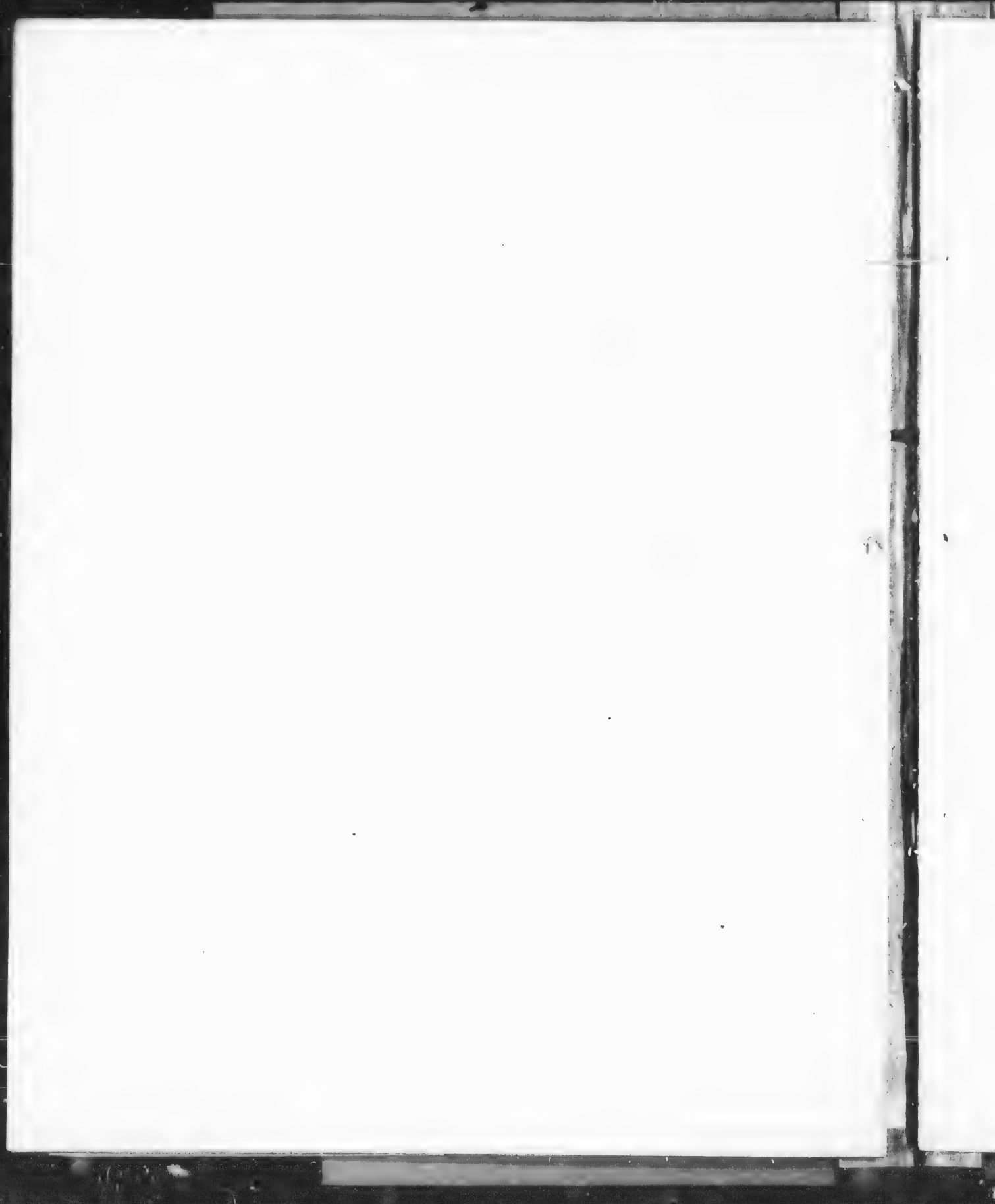
JOHN A. WATSON, *Plaintiff,*

vs.

WILLIAM R. HENEY, LORENZO A. BARNABY, and THOMAS J. PAYNE, *Defendants.*

It is ordered by the court, that on security being given by the said defendants, by a bond to be signed by Lorenzo A. Barnaby and Thomas J. Payne, together with two sureties conditioned in the payment of the sum of three hundred and thirty-seven dollars to the above named plaintiff, to be approved of by the Judge, and filed with the clerk of this court, in eight days from the date hereof, the said defendants shall have leave to appeal, and an appeal is hereby granted to the Supreme Court, from the decision of this court, in favor of the plaintiff, given herein on the first day of December, instant, upon the following grounds: 250

1. Because the said decision is against the law and evidence taken herein.



2. Because the irregularity referred to in said decision is not waived by the pleas pleaded herein.

3. Because the fourth and sixth pleas pleaded herein are a good defence to this action, and do not waive the said irregularity.

4. For that the judgment of this honorable court is in favor of the plaintiff, whereas said judgment should have been for the defendants, or some of them, because the steps necessary to entitle the plaintiff to recover against the bail,—that is to say the said Lorenzo A. Barnaby and Thomas J. Payne were not taken by the plaintiff, and no right of action against said bail ever accrued to the plaintiff. 260

5. Because the plaintiff on the twenty-sixth day of June, A. D., 1880, recovered judgment in this honorable court against the said defendant William R. Heney, and on the same day issued an execution upon said judgment, directed to the Sheriff of the County of Halifax, and said execution was returned non est inventus, by the said Sheriff, on the 5th day of July, A. D., 1880, that in consequence of such return, the said defendants were not permitted the time allowed them by law, wherein to render the said defendant William R. Heney, as appears by the evidence returned in this cause and thereunder the defendants Lorenzo A. Barnaby and Thomas J. Payne were entitled to judgment. 270

6. Because said judgment is against all the defendants, whereas the principal, William R. Heney, was never served.

Because the issuing of the *capias* is not set out in the writ of summons herein as required by law.

And it is further ordered that all proceedings herein on the part of the plaintiff be stayed until said appeal be determined.

Dated at Halifax, this 9th day of December, A. D., 1880.

BY THE COURT.

M. I. WILKINS,
Clerk.

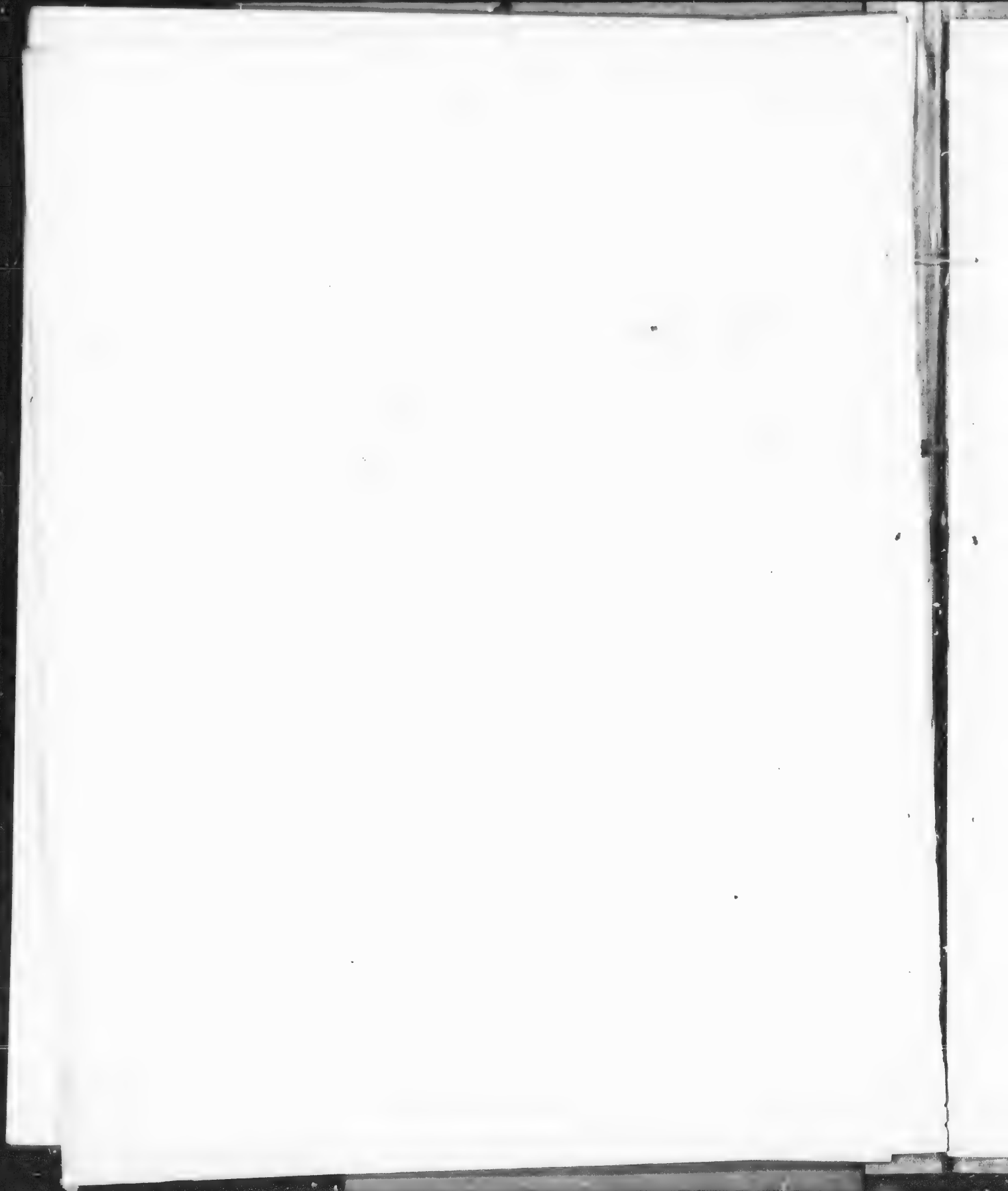
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On motion of Mr. Menger.

“F.”

Know all men by these presents that we, William R. Heney, merchant, Thomas J. Payne, clerk, and Lorenzo A. Barnaby, all of the City of Halifax, are held and stand jointly and separately bound unto Joseph Bell, Sheriff of the County of Halifax, in the Province of Nova Scotia, in the sum of one hundred and seventy-seven dollars and fifty cents, to be paid to the said Sheriff, his lawful attorney, heirs, executors, administrators or assigns, to which payment well and truly to be made we jointly and severally bind ourselves, our and each of our executors and administrators firmly by these presents, sealed with our seals, dated the 26th day of April, the forty-third year of the reign of our Sovereign Lady the Queen, and the year of our Lord one thousand eight hundred and eighty. 290

The condition of this obligation is such that, if the above bounden William R. Heney do appear in the County Court at Halifax within ten days from the date hereof, to answer to the suit of John A. Watson, and in case judgment shall be obtained against the said William R.



Heney, if he shall satisfy said judgment, or render himself or be rendered by the said Thomas J. Payne and Lorenzo A. Barnaby into the custody of the Sheriff of the County of Halifax, then the said obligation to be void.

W. R. HENY. [L. S.]
 THOMAS J. PAYNE. [L. S.]
 LORENZO A. BARNABY. [L. S.] 300

Signed, sealed and delivered in the presence of
 OTTO S. WEEKS.

JOSEPH BELL.

"G."

HALIFAX, SS.

*Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland,
 Queen, Defender of the Faith, and of the United Church of England and Ireland,
 on Earth the Supreme Head.*

TO THE SHERIFF OF THE COUNTY OF HALIFAX, OR TO ANY OTHER OF OUR SHERIFFS :

We command you to take William R. Heney, yeoman, of Halifax, in the County of 310
 Halifax, if he shall be found in your bailiwick, and him safely keep until he shall have given
 you bail or made deposit according to law, in an action at the suit of John A. Watson, or until
 the said William R. Heney shall by other lawful means be discharged from your custody.
 And we do further command you that immediately after the execution hereof, you do return
 this Writ into our County Court at Halifax, together with the manner in which you shall
 have executed the same, and the day of the execution thereof: or if the same shall remain
 unexecuted, then that you do return the same at the expiration of one month from the date
 hereof.

Issued this 24th day of April, A. D. 1880.

Signed. M. I. WILKINS, 320
 Clerk.

J. W. LONGLEY, *Plaintiff's Attorney.*

By oath for one hundred and twenty-seven dollars and fifty-nine cents.

Signed. CHAS. TAYLOR,
Commissioner Supreme Court for the County of Halifax.

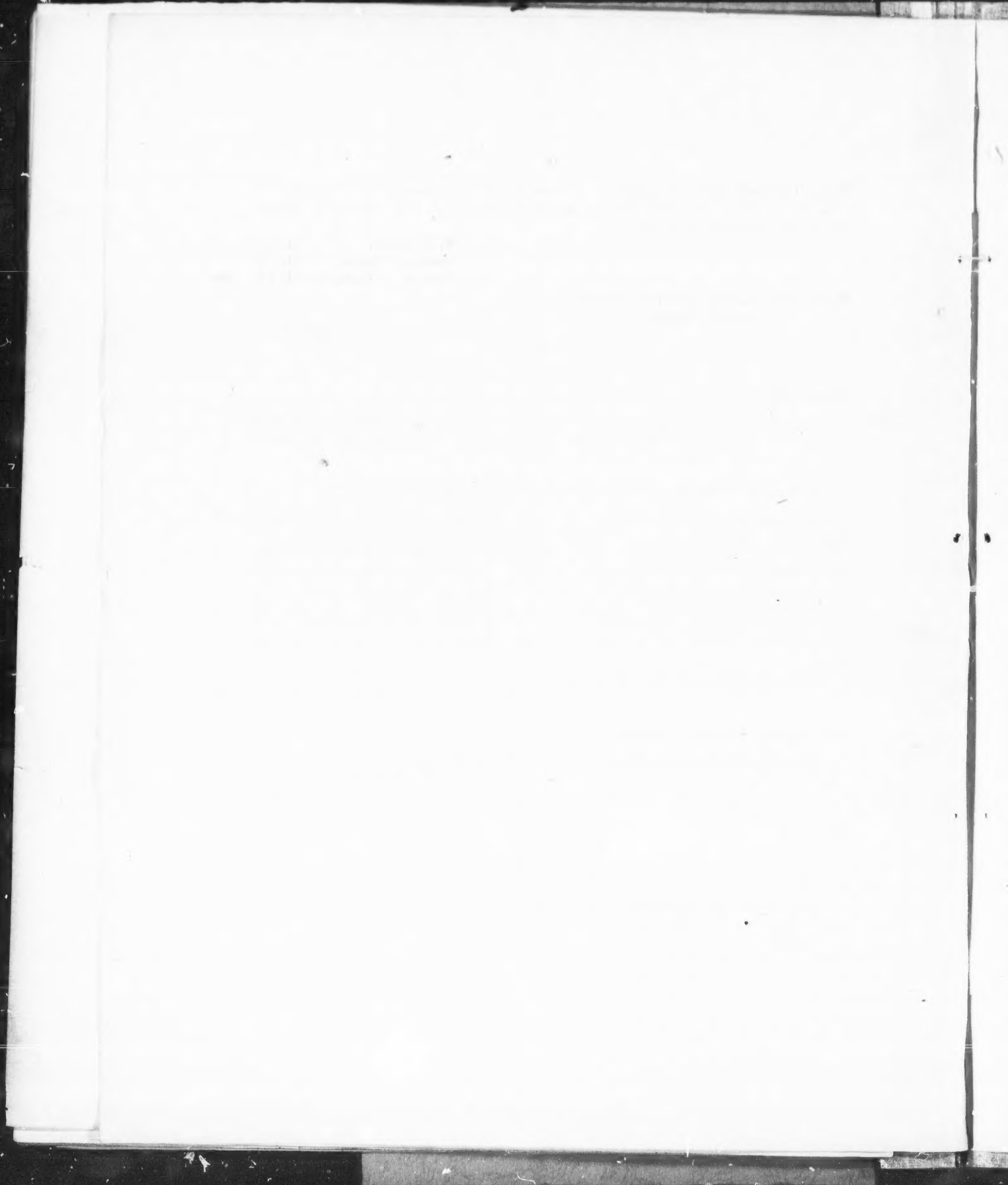
THE COUNTY COURT.

WATSON }
 vs. } Capias.
 HENY. }

Under this Writ I arrested the within named defendant on the 24th day of April, 1880, 330
 and afterwards released him from custody on Bail, as will appear by bond hereto annexed.

Fees \$1.10.

JOSEPH BELL,
Sheriff.



"H."

IN THE COUNTY COURT, 1880.

HALIFAX, SS.

JOHN A. WATSON, *Plaintiff*,*vs.*WILLIAM R. HENEY, THOMAS J. PAYNE, and LORENZO A. BARNABY, *Defendants*.

340

I appear in this cause for the above-named defendants—William R. Heney and Lorenzo A. Barnaby.

ALEXANDER McDONALD,

Attorney of Defendants—William R. Heney and Lorenzo A. Barnaby.

Halifax, 20th July, 1880.

To the Plaintiff or his Attorney.

"I."

Know all men by these presents, that we, Lorenzo A. Barnaby, of the City and County of Halifax, in the Province of Nova Scotia, clerk, Thomas J. Payne, of the same place, book-keeper, William McFatridge, of the same place, merchant, and Arthur W. Redden, of the same place, merchant, are jointly and severally held and firmly bound to John A. Watson, of Saint John, New Brunswick, in the sum of three hundred and thirty-six dollars and twenty-six cents, lawful money of Canada to be paid to the said John A. Watson or his certain attorney, administrators or assigns, for which payment to be made we bind ourselves and each and every of us in the whole, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

350

Sealed with our seals and dated this ninth day of December, A. D. 1880.

Whereas, in an action in the County Court in Halifax, tried therein, the said John A. Watson recovered judgment against the above-named Lorenzo A. Barnaby and Thomas J. Payne for the sum of one hundred and seventy-six dollars and twenty-six cents;

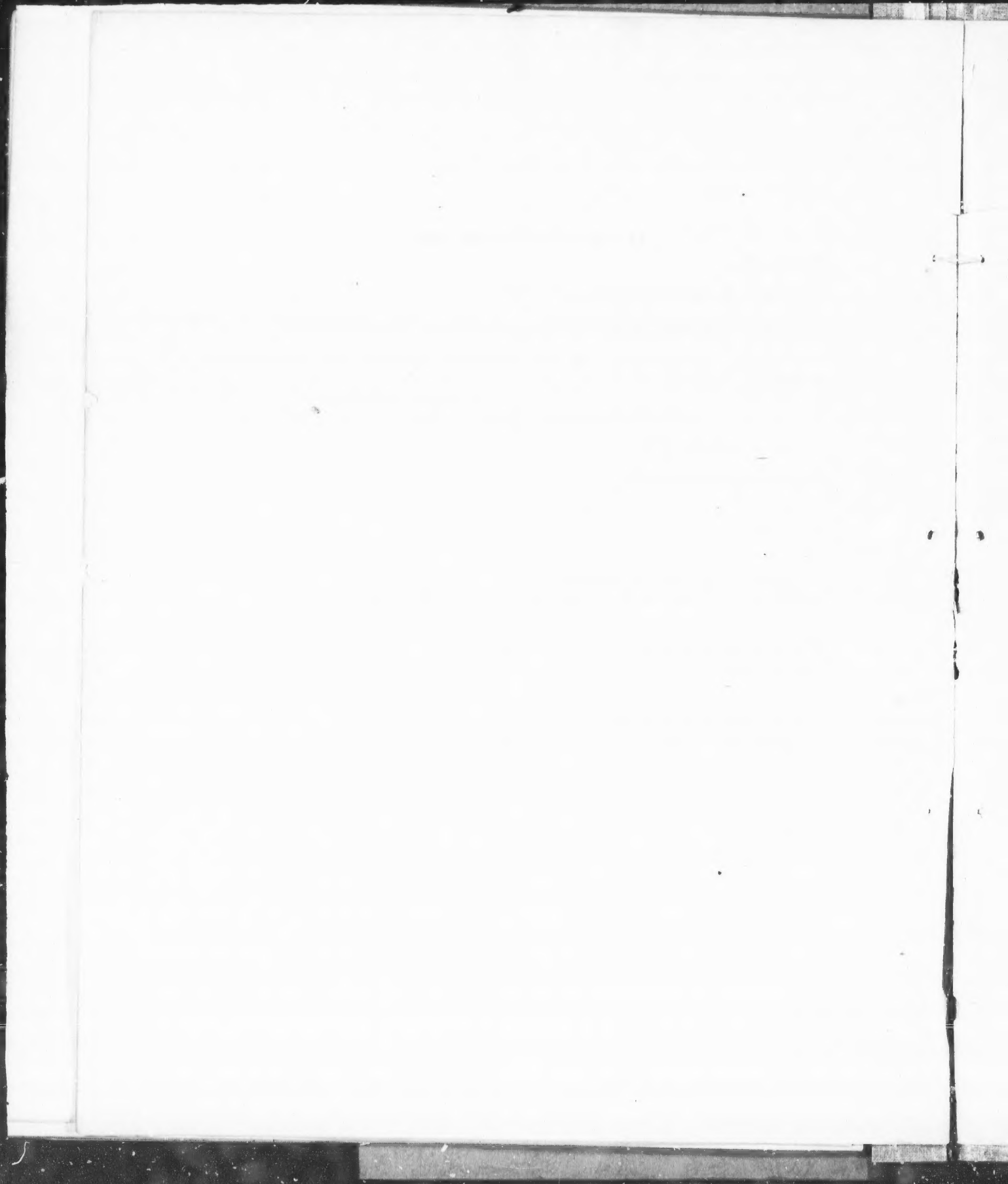
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And Whereas, the said Lorenzo A. Barnaby and Thomas J. Payne being dissatisfied with the said judgment obtained from said Court, a rule whereby they were granted an appeal from the said judgment to the Supreme Court, upon their filing a bond to be approved of by the Judge of the said Court, as security for the payment of the amount of the said judgment and costs;

And Whereas, the said Lorenzo A. Barnaby and Thomas J. Payne have agreed to give such security to respond the judgment;

Now the condition of this obligation is such, that if the above bounden Lorenzo A. Barnaby, Thomas J. Payne, William McFatridge, and Arthur W. Redden, any or either of them, shall pay into the said John A. Watson, his executors, administrators or assigns, the

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costs of the said appeal as the said Court of Appeal shall order, and shall also in case the said appeal shall be dismissed, pay to the said John A. Watson, his executors, administrators or assigns, the said sum of one hundred and seventy-six dollars and twenty-six cents, then this obligation shall be void, otherwise shall be and remain in full force and virtue.

Signed,	LORENZO A. BARNABY,	[L. S.]
do.	THOMAS J. PAYNE,	[L. S.]
do.	WM. MCFATRIDGE,	[L. S.]
do.	A. W. REDDEN,	[L. S.]

Signed, sealed and delivered by the above-named
Lorenzo A. Barnaby, Thomas J. Payne,
Wm. McFatridge, and Arthur W. Redden,
in presence of

JOHN MENDER.

Approved.

J. W. JOHNSTON.